

FILED '09 FEB 25 16:13 USDC-ORE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DIANE L. SANDERS,)	
)	
Plaintiff,)	Civ. No. 07-0776-TC
)	
v.)	Opinion and Order
)	
)	
)	
CITY OF NEWPORT, an Oregon)	
Municipal Corporation,)	
)	
Defendant.)	

Coffin, Magistrate Judge:

Before the court is plaintiff's motion for attorney fees (#109) and bill of costs (#113), and defendant's bill of costs (#91). For the following reasons, plaintiff's motion for attorney fees is GRANTED in part; the parties' bills of costs are offset and plaintiff's bill is GRANTED in part.

Background

Plaintiff brought several federal and state claims against defendant stemming from her discharge from employment. After a jury trial, a defense verdict was returned on all claims tried

1 to the jury. Two state law claims were tried to the court:
2 plaintiff's Oregon Family Leave Act ("OFLA") claim and her
3 claim alleging retaliation for complaining about workplace
4 safety. This court found for defendant on the retaliation
5 claim and in favor of plaintiff on the OFLA claim. The court
6 awarded plaintiff \$68,040, consisting of back pay, front pay,
7 and insurance costs.

8
9 Standard

10 Under ORS 659A.885(1), the court "may allow the prevailing
11 party costs and reasonable attorney fees at trial" in an action
12 under OFLA. ORS 20.075(1) lists eight factors that a court
13 "shall consider * * * in determining whether to award attorney
14 fees in any case in which an award of attorney fees is
15 authorized by statute and in which the court has discretion to
16 decide whether to award attorney fees[.]" By its terms, then,
17 ORS 20.075(1) applies to the discretionary decision whether to
18 award fees under ORS 659A.885(1).

19 The court considers the following factors regarding
20 whether to award attorney fees to the prevailing party and, if
21 so, what amount:

22 "(a) The conduct of the parties in the transactions or
23 occurrences that gave rise to the litigation, including
24 any conduct of a party that was reckless, willful,
25 malicious, in bad faith or illegal.

26 (b) The objective reasonableness of the claims and
27 defenses asserted by the parties.

28 (c) The extent to which an award of an attorney fee in the
case would deter others from asserting good faith claims
or defenses in similar cases.

(d) The extent to which an award of an attorney fee in the

1 case would deter others from asserting meritless claims
2 and defenses.

3 (e) The objective reasonableness of the parties and the
4 diligence of the parties and their attorneys during the
5 proceedings.

6 (f) The objective reasonableness of the parties and the
7 diligence of the parties in pursuing settlement of the
8 dispute.

9 (g) The amount that the court has awarded as a prevailing
10 party fee under ORS 20.190.

11 (h) Such other factors as the court may consider
12 appropriate under the circumstances of the case.

13 (2) A court shall consider the factors specified in
14 subsection (1) of this section in determining the amount
15 of an award of attorney fees in any case in which an award
16 of attorney fees is authorized or required by statute. In
17 addition, the court shall consider the following factors
18 in determining the amount of an award of attorney fees in
19 those cases:

20 (a) The time and labor required in the proceeding, the
21 novelty and difficulty of the questions involved in the
22 proceeding and the skill needed to properly perform the
23 legal services.

24 (b) The likelihood, if apparent to the client, that the
25 acceptance of the particular employment by the attorney
26 would preclude the attorney from taking other cases.

27 (c) The fee customarily charged in the locality for
28 similar legal services.

(d) The amount involved in the controversy and the results
obtained.

(e) The time limitations imposed by the client or the
circumstances of the case.

(f) The nature and length of the attorney's professional
relationship with the client.

(g) The experience, reputation and ability of the attorney
performing the services.

(h) Whether the fee of the attorney is fixed or
contingent."

"(1) In any action or suit in which one or more claims are asserted for which an award of attorney fees is either authorized or required, the prevailing party on each claim shall be determined as provided in this section. The provisions of this section apply to all proceedings in the action or suit, including arbitration, trial and appeal.

(a) Identify each party that prevails on a claim for which attorney fees could be awarded; [and]

ORS 20.077.

Plaintiff was the "prevailing party" on her OFLA claim, and under ORS 659A.885(1), this court is authorized to award her attorney fees on that claim. However, plaintiff requests an award for "all hours worked on this case," a total of 276.10 hours, or \$72,586.00.

¹ Those factors are similar to the factors espoused in Hensley v. Eckhert, 461 U.S. 424, 430 (1983) (discussing the Civil Rights Attorney's Fees Awards Act of 1976).

1 are not. Plaintiff may not recover attorney fees for work on
2 unsuccessful claims wholly unrelated to the successful claim.
3 Hensley, 461 U.S. at 439. Claims are unrelated if they (1) are
4 distinct in all respects" from each other; (2) seek different
5 relief based on different facts and different legal theories;
6 and (3) require unrelated work by counsel. Id. at 434-35, 440.

7 Plaintiff's claims under OFLA and FMLA sought identical
8 relief and were based on identical facts. Defendant, as noted,
9 does not contest the interrelationship of these claims.
10 Despite defendant's argument that plaintiff's state and federal
11 disability claims were unrelated to the successful OFLA claim,
12 I find that these claims were also inextricably interwoven with
13 the OFLA/FMLA claims; at the core of each was the defendant's
14 medical condition (i.e., the diagnosis of Multiple Chemical
15 Sensitivity), her taking of medical leave, and the defendant's
16 actions in discharging her because of concerns about her
17 sensitivity to unknown chemicals. Although the legal issues
18 pertaining to the medical leave claims and the disability
19 claims were different, the factual underpinnings were
20 essentially the same. Consequently, I find that much, albeit
21 not all,² of the hours expended on the disability claims were
22 "related" to plaintiff's successful OFLA claim.

23 The retaliation claims, however, were insufficiently
24 related to plaintiff's OFLA claims as they centered on the
25 contention that defendant fired plaintiff because she raised
26 issues around workplace safety and caused an OSHA investigation

27
28 ² For example, preparing jury instructions for the disability
claims.

1 of her workplace environment. Accordingly, I reduce the fee
2 award somewhat to reflect the lack of success on the
3 retaliation claims. I note, however, that very little evidence
4 or trial time was focused exclusively on the retaliation
5 claims,³ and thus I will discount the overall fee award by 10%.

6 Moreover, plaintiff requests attorney fees in excess of
7 those "customarily charged in the locality for similar legal
8 services at a rate that exceeds the prevailing rate in the
9 community for similar work performed by attorneys of comparable
10 skill, experience, and reputation." Plaintiff argues that
11 this was a "complex employment discrimination claim" and that
12 the rate is not excessive. However, considering the "time and
13 labor required in the proceeding, the novelty and difficulty of
14 the questions involved in the proceeding and the skill needed
15 to properly perform the legal services," along with the other
16 factors in ORS 20.075, this court finds the rate excessive.

17 "To determine whether a requested hourly rate is
18 reasonable, this Court uses the Oregon State Bar Economic
19 Survey as an initial benchmark." Roberts v. Interstate
20 Distrib. Co., 242 F. Supp. 2d 850, 857 (D. Or. 2002). A party
21 seeking to deviate from the rates must "provide ample
22 justification." Id.

23 Plaintiff's petition requests an hourly rate of \$275 for
24 plaintiff's lead attorney. That rate exceeds that prescribed
25 by the Economic Survey for the Portland area. The average rate
26

27 ³ The evidence regarding the OSHA tests, for example, was also
28 relevant to plaintiff's medical condition and the issue of whether
defendant was justified in discharging her after she had been cleared
by her physician to return to work.

1 for an attorney with 10-12 years of experience is \$235 per
2 hour, while the average rate for a plaintiff's attorney in
3 civil litigation (excluding personal injury) is \$240, and the
4 median is \$225. Plaintiff's counsel does not submit any
5 information as to why he is entitled to an amount above those
6 average figures. His statements that the issues were "novel,"
7 that he refused other cases, and that the contingent nature of
8 the fee agreement are also unsupported.

9 This court therefore awards plaintiff attorney fees at the
10 rate of \$240 per hour for 193.77 hours (reducing plaintiff's
11 stated total of 215.30 by 10% because not all of the claims
12 were related) for a total of \$46,504.80. In addition, this
13 Court awards additional attorney fees of \$12,040.65 for work
14 done by other legal professionals in counsel's firm, at the
15 rates requested, but reduced in hours by 10% for work unrelated
16 to the prevailing OFLA claim.

17 Plaintiff requests expert witness fees, relying upon ORS
18 20.107; however, that statute does not authorize relief in this
19 case, as the prevailing claim was not one of unlawful
20 discrimination as defined by ORS 20.107(4). Instead, ORS
21 20.075 authorizes a discretionary award to the prevailing party
22 on a claim of attorney fees with no mention of expert witness
23 fees. Similarly, ORS 659A.855 allows a discretionary award of
24 attorney fees and does not mention expert witness fees.
25 Therefore, this court declines to award expert witness fees to
26 plaintiff.

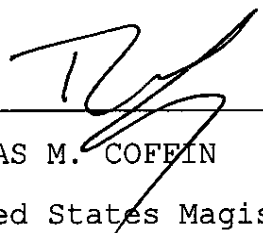
27 Each party requests costs, plaintiff in the amount of
28 \$1,943.20, and defendant \$1,114.20. This court will offset the

1 respective costs and thus award plaintiff a net of \$829.00.
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3 Conclusion

4 For the foregoing reasons, plaintiff is awarded \$58,545.45
5 in attorney fees and \$829.00 in costs.
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7 Dated this 25th day of February, 2009.
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12 THOMAS M. COFFIN

13 United States Magistrate Judge
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